The Contingency of Governance in the EU

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> “The necessary presence of the state in all spheres of social life requires a fast, agile and flexible procedure, which allows for the satisfaction of public needs, without forgetting the guarantees due to the administered in compliance with the principles enshrined in our Fundamental Laws”.[1)] “La necesaria presencia del Estado en todas las esferas de la vida social exige un procedimiento rápido, ágil y flexible, que permita dar satisfacción a las necesidades públicas, sin olvidar las garantías debidas al administrado en cumplimiento de los principios consagrados en nuestras Leyes Fundamentales.”

Putting aside the categorical statement regarding the role of the state in society, and the outdated reference to the ‘administered’, this sentence could have featured in a contemporary piece of legislation on the administrative procedure. Despite its source – the preamble of the Spanish law on the administrative procedure adopted in 1958 – it expresses core contemporary principles of public decision-making and the triad that makes procedures evolve: speed, agility, and flexibility at the service of public needs and purposes, the protection of fundamental guarantees of the individual or the private actor in their relationship with the administration, abidance by constitutional strictures.

Adopted under Franco’s authoritarian regime, this law was one of the pieces of legislation that sought to bring the activity of the executive squarely within the realm of the law. It sought to correct the “original illegitimacy” of a regime that, while admitting pockets of a Rechtsstaat, denied fundamental freedoms and democracy.

For all those (myself included) who have analysed the normative possibilities for the EU to compensate or overcome its legitimacy deficits with decision-making procedures and techniques in line with the standards of the rule of law established in its founding treaties and in its case law, this anecdotal reference serves as caution. Administrative lawyers are of course aware that the techniques they study and use have existed in different historical periods and have been deployed in different political regimes. But these comparative referents tend to disappear too quickly when it comes to deriving from the governance virtues of the EU, practiced by its institutions and agencies, and the law that may incorporate them, the ability to transform the constitutional characteristics of a political system.

The Sense of Unlikely Parallels

Invoking the administrative law of Franco’s Spain and governance procedures in the EU in parallel may seem displaced. It is not an implicit way of suggesting that the EU

is authoritarian. Such suggestion would be absurd, constitutionally, historically, and politically. Worrying traits of the EU may deserve the epithet “authoritarian”, based on sophisticated theoretical analyses, but that is not the point I wish to make here.

The parallel stresses forcefully the impossibility of relying on administrative procedures as techniques that define how public powers function and relate to society in order to change the constitutional attributes of the polity that practices them. The guarantees that the law of 1958 protected were more than window-dressing but they were not meant to change the constitutional features of an authoritarian regime. The governance principles and techniques that have imbued decision-making in the EU, and in many of its Member States, have been a vehicle of a political transformation in the way of delivering public goods, but the articulation between different public and private actors that they enable are not surrogate of democratic processes: they do not give new constitutional clothes to the EU. Depending on the political-economic contexts in which they operate, on the institutional structures in which they are inserted and on the procedural mechanisms that support them, they can further erode, rather than complement, the role of representative institutions. Despite their openness, they comport important risks to democracy and may impact on the ability of citizens to exercise their rights.

This is why a piece denouncing governance as an empty signifier, tracing the genealogy of the term and its mutations, and critiquing the “usurpation of language” when it is qualified as democratic, is important. I am referring to the chapter by Emilios Christodoulidis in *The Law of Political Economy* edited by Poul Kjaer. Ideally, it would prompt those who use the term “democratic governance” to indicate how the theoretical constructions they create or rely on can withstand critique or to consider what it means to use concepts without the specification of their meaning (when that is the case).

Academic and Institutional Constructions

The enthusiasm of EU lawyers with the transformative potential of EU governance in the period that bridges the reform of the Commission subsequent to the fall of the Santer Commission and the onset of the Eurozone crisis is understandable. It stood for overcoming the rigid boundaries of hierarchical forms of government, for giving voice to ‘civil society’ (however defined), and because of the informality and flexibility it heralded, for opening possibilities of EU action in fields where Member States had retained their competences (social and economic policy coordination), for strengthening the legitimacy basis of decision-making in other areas.

Academically, it had the appeal of innovation, of treading new ground given the manifold possibilities of moulding a pliable concept to the best normative intentions of each author. Academic work contributed to extending the “semantic reach” (Christodoulidis, p. 68) of the term governance, including by works directed at examining “the transformation of governance in Europe (and beyond) by mapping, evaluating and analysing the emergence, execution, and evolution of … ‘New Modes of Governance’”, by which was meant “the range of innovation and transformation that has been and continues to occur in the instruments, methods, modes and

systems of governance in contemporary polities and economies, and especially within the European Union (EU) and its member states".

Governance inexorably continued its course of displacing law, its formality, and categories (in Europe and beyond) – a risk of which lawyers were well aware. Whether one was acclamatory or critical, the transformations it engendered could not (and cannot) be ignored. As Christodoulidis argues, the vagueness of the term favoured its mutation from the new public management roots (which critics did not fail to stress) to the currency language for comprehending and analyzing the exercise of authority and the relationship between public and private actors in multi-level systems and within the state. The focus on outcomes and efficiency – clearly predominant in the official discourse – perpetuated its link to the original market-oriented thinking.

Academic discourse reflected EU institutional practice that had been quick to absorb the language and normative appeal of governance and that law only partially reflected. Enforceable rights of access to information are patently only one fraction of the world of transparency; participation in rulemaking disregards formality (expect where enshrined in legislation) and the language of rights to ensure the "timely delivery of policy"; reasons require deference from courts to avoid undue disruption of policy. Openness as an anchor of democratic accountability pervades both institutional and academic analyses. But it essentially opens multiple spaces of negotiation (within or outside networks and committees whose minutes may then be found online with varying degrees of detail) where the boundaries between public and private, between local, state and European, dissolve, where litigation is precluded and, possibly, avoided, where assessments of impact are forged (purportedly without precluding policy decisions, and nevertheless establishing how the EU should intervene when shaping markets and society), where "stakeholders" and "interested parties" are the counterparts that replace the citizen in the relationship with public powers that procedures mediate.

Governance without Adjectives

These are the spaces that, in different forms, embody the so-called "democratic governance" through political processes that develop largely at the margin of law. Yet, they channel into legal procedures the knowledge of experts, stakeholders, public administrations that gives meaning to the concepts and norms that legislation uses and establishes. They forge the specific understandings of public interest that public decision-makers vindicate in the formal legal acts and informal "soft" guidelines and decisions. Generally, legal texts presuppose the existence of such processes (the Commission that initiates EU legislation is one of their main proponents). Sporadically, law absorbs them, as functional equivalents to legal obligations of uncertain scope.

Calling these processes democratic presupposes that the forms of participation they foster are a surrogate for the participation of citizens in the polity. It mobilizes constitutional languageto validate processes that replace the citizen by the stakeholder, and, thereby, privilege interest-holders "in the definition of the stakes"

and in the processes through which they are protected (Christodoulidis). In such processes, equality and inclusion of the non-represented views, even if a concern, necessarily give in to the need of finding workable substantive outcomes. Calling them “democratic” holds back the critique of the processes through which the public interest is defined in the EU and elsewhere (Christodoulidis again). It gives an enhanced normative justification to good governance practices that they cannot uphold, even where they seek to strike the best possible balance between the impossible ideal conditions of ‘deliberation’ and the incontestable need of delivering outcomes, within the logic that they establish (Christodoulidis still).

Democratic language has gradually pervaded academic and institutional discourses of EU governance, if not only by reference to the citizen and civil society (perhaps less present today in official documents than, still, in academic analyses). Yet, dropping the ‘democratic’ from governance and taking governance for what it is – a specific way of delivering public policy that incorporates the public and the private and presupposes procedures that privilege outcomes and efficiency – is a corollary of the opening proposition that administrative procedures, no matter their merits, cannot drive a fundamental mutation of constitutional regimes and correct their original constitutional or constitutive traits, however undesirable in the eye of the beholder. Just as exemplary administrative procedures cannot engender a constitutional state in an authoritarian regime, governance processes cannot engender a democratic polity where it is lacking. They can, however, change the way policy is delivered and the relationship between the public and private spheres, and impact on the ability of law acting as a limit to the exercise of executive power.

Public Needs, Rights, and Constitutional Norms: Governance in a Dynamic Triad

Governance in the EU has changed fundamentally one element of the triad of administrative procedures that the Spanish law of 1958 identified: it gives specific answers to the demand of speed, agility, and flexibility at the service of public needs and purposes, which favour informality and the role of private actors. Unlike that law of 1958, it operates within a normative framework that abides by the tenets of liberal constitutionalism: the rights that individuals and private actors can invoke before the administration to trump the political process, to sanction unauthorized restrictions or breaches of those rights, are enshrined in constitutional catalogues of rights. But transformations in the way of delivering public goods impacted, indirectly, the operation of the other elements of the triad: rights and constitutions. Like in any political system, the extent to which rights can effectively act as limits to the administration depends on how those rights are legally protected and on who has standing and capacity to invoke them in court. The interplay between the processes that support the delivery of public goods and judicially enforceable rights may reinforce the power asymmetries of contemporary societies, if the informality of the former weakens the legal position of otherwise rights’ holders (possibly excluded from the negotiation spaces that governance opens) and if effective rights’ holders do not have the capacity to mobilize the means that the legal system establishes to counter government action.

Contemporary governance structures and procedures appear, at present, unrelenting, but, at the same time, they reflect the concerns and political conceptions prevailing at least since the early 2000s (earlier if one traces governance back to new public management). They are in essence only specific modes of delivering public goods – and of defining what they are – even if the interrelationship between the three parts of the triad means that changes spill-over to the other elements. Are they suited to address the problems of contemporary societies, on the brink of what appear to be fundamental changes? If not, what are alternative and plausible institutional configurations? By which normative standards should existing and future structures and procedures be assessed? Who are the actors that can drive change? How can those excluded from the governing processes be protected, in accordance with the political principles that current constitutions uphold? These are some of the questions that the critique of governance opens and makes it, in 2020, possibly more relevant than ever.

References

- 1. “La necesaria presencia del Estado en todas las esferas de la vida social exige un procedimiento rápido, ágil y flexible, que permita dar satisfacción a las necesidades públicas, sin olvidar las garantías debidas al administrado en cumplimiento de los principios consagrados en nuestras Leyes Fundamentales.”
